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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1043

THE HONORABLE LOUIS J. LEFKOWITZ, New York State Attorney General,

Petitioner,

against

ALONZO SINGLETON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	2
A. Introduction	2
B. State Court Proceedings	3
C. The Opinion of the District Court	7
D. The Opinions in the Second Circuit	8
REASON FOR GRANTING THE PETITION FOR CERTIORARI— The Court of Appeals' decision that the State violated respondent's Sixth Amendment rights was reached without the benefit of a hearing or allegations of fact peculiarly within respondent's knowledge and constitutes an unwarranted and improper exercise of judicial power by the federal courts over a question of state law	11
Conclusion	16
Appendix A	1a
Appendix B	26a
Appendix C	27a
Appendix D	29a
Appendix E	35a

PAGE

Dearinger v. *United States*, 468 F. 2d 1032 (9th Cir. 1972) 12

Henderson v. *Kibbe*, 431 U.S. 145 (1977) 12

Lisenba v. *California*, 314 U.S. 219 (1941) 11

People v. *Singleton*, 41 N.Y. 2d 402 (1977) 3, 6

People v. *Singleton*, 50 A.D. 2d 939 (2d Dept. 1975) .. 3

Preiser v. *Rodriquez*, 411 U.S. 475 (1973) 17

Procunier v. *Atchley*, 400 U.S. 446 (1971) 11

Stone v. *Powell*, 428 U.S. 465 (1976) 3

Townsend v. *Sain*, 372 U.S. 293 (1963) 17

Ungar v. *Sarafite*, 376 U.S. 575 (1964) 12, 17

United States v. *Ballesteros-Acuna*, 527 F. 2d 928 (9th Cir. 1975) 15

United States v. *Haldeman*, 559 F. 2d 31 (D.C. Cir. 1976) 12, 14

United States v. *Taylor*, 562 F. 2d 1345 (2d Cir. 1977) 11, 14

United States v. *Wyler*, 482 F. 2d 170 (2d Cir. 1973).. 12

United States ex rel. Cummings v. *McMann*, 429 F. 2d 1295 (2d Cir. 1970) 11

United States ex rel. Holes v. *Mancusi*, 423 F. 2d 1137 (2d Cir. 1970) 11

United States ex rel. Hunter v. *Patterson*, 374 F. Supp. 608 (S.D.N.Y. 1974) 11

United States ex rel. Rosen v. *Follette*, 409 F. 2d 1042 (2d Cir. 1969) 11

Wainwright v. *Sykes*, 433 U.S. 72 (1977) 13, 14, 17

Washington v. *Texas*, 388 U.S. 14 (1967) 11, 12, 13

Wilson v. *Fogg*, 571 F. 2d 91 (2d Cir. 1978) 17

STATUTE CITED

28 U.S.C. § 1254(1) 2

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Petitioner, Louis J. Lefkowitz, Attorney General of the State of New York, prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, dated September 12, 1978, which granted respondent Singleton's habeas corpus application to the extent of directing that he be retried by the New York State courts or released. This decision reversed the judgment of the United States District Court for the Southern District of New York, dated November 18, 1977, which denied the application.

Opinions Below

The opinion of the Court of Appeals is reported at 583 F. 2d 618 and is reproduced herein as Appendix "A". The

orders of the Court of Appeals which denied petitioner's motion for rehearing with suggestion for rehearing *en banc* are reproduced herein as Appendices "B" and "C". The opinion of the District Court is unreported and is reproduced herein as Appendix "D". The Order of the Court of Appeals recalling its mandate and granting a stay pending the filing of this petition is reproduced herein as Appendix "E".

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on September 12, 1978. A timely petition for rehearing or rehearing *en banc* was denied on November 1, 1978.

Question Presented

Was the Court of Appeals warranted in substituting its judgment for that of the state courts and voiding a state court conviction on the basis of an alleged violation of the Sixth Amendment right to compulsory process when the petitioner for this relief never alleged either in state or federal court what favorable testimony the witness would give and nothing in the record excused his failure to make such allegations?

Statement of the Case

A. Introduction

Respondent was convicted of the crime of criminal possession of a dangerous drug in the fourth degree after a jury trial in Supreme Court, New York County, Central Narcotics Part (KORN, J.). He was sentenced on October 16, 1973 to an indeterminate term of three years.

On appeal the judgment of conviction was unanimously affirmed by the Appellate Division, Second Department (*People* v. *Singleton*, 50 A D 2d 939 [2d Dept. 1975]) and by the New York Court of Appeals, with one dissent (*People* v. *Singleton*, 41 N Y 2d 402 [1977]).

B. State Court Proceedings

Respondent and two other men, Joseph Powell and David Lester Knowles, were arrested on the evening of September 24, 1971 after heroin was discovered in the car in which they had been riding.* After being arraigned following his arrest, respondent was released, although it is not clear whether he was released on his own recognizance or bailed. When he failed to appear on October 1, 1971, a bench warrant was issued by the Criminal Court.

On January 6, 1972, respondent, Powell and Knowles were indicted by a Queens County Grand Jury for acting in concert for the crime of criminal possession of a dangerous drug in the fourth degree and, on January 18, 1972, a bench warrant was issued by Supreme Court, New York County, since respondent still had not appeared.

On March 9, 1972, Powell was acquitted after trial. Knowles entered a guilty plea on October 10, 1972 to criminal possession of a dangerous drug in the sixth degree and, on October 25, 1972, he was sentenced to time served.

Respondent finally appeared on his bench warrant on February 23, 1973. Kassner & Detsky, the firm which ultimately represented him at trial, was assigned on July 17, 1973.

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* The circumstances of the arrest were the subject of a motion to suppress and were challenged by respondent on his direct appeal. In each instance, respondent's Fourth Amendment claim was rejected. Therefore, review of this issue by way of federal habeas corpus is precluded by this Court's decision in *Stone* v. *Powell*, 428 U.S. 465 (1976). However, the facts relating to the arrest are a relevant part of the People's case against respondent.

On August 9, 1973, a hearing was held in Supreme Court, Special Narcotics Term, on respondent's motion to suppress. After hearing the testimony of one of the arresting officers, the motion was denied (FEIN, J.). Respondent did not testify at the hearing.

Respondent's trial began on August 22, 1973. Before the first witness was called and in response to a request by the prosecutor, defense counsel agreed not to refer to the dispositions in the cases against Knowles and Powell. Defense counsel apprised the court of what the dispositions were and stated,

> "And in [Knowles'] plea of guilty, he had told the court that the drugs belonged to Joseph Powell and he knew that because he saw Joseph Powell buy the drugs and there was no implication at all of Mr. Singleton. Now I have subpoenaed both of those defendants, Your Honor." (18-19)*

The witnesses for the prosecution were the two arresting officers and a laboratory expert. The officers testified that they stopped the car in which respondent was riding as it approached the Triborough Bridge in Manhattan. The occupants of the car were Joseph Powell, the driver, David Lester Knowles, who was seated in the rear seat and respondent who was seated in the front passenger seat. Because the officers were using an unmarked car the occupants of the stopped car apparently did not realize that it was the police who had stopped them (65).

Powell got out of the car as the officers approached it (97). After one officer asked Powell for his license and registration, respondent and Knowles also left the car (98). A search of the car took place after Knowles attempted to

* Unless otherwise indicated, numbers in parentheses refer to pages of the transcript of respondent's trial.

reach into it (101.) Drugs were found in two envelopes, an open one on the console between the passenger's and driver's seats, and a closed one lodged between the console and the driver's seat (108). The laboratory expert confirmed that both envelopes contained heroin.

After the prosecution rested, respondent's attorney asked the Court for a continuance on the ground that although subpoenas had been served on both co-defendants two days earlier, neither had appeared in response. The request was granted (208).

The following day, when the Court reconvened, defense counsel requested a further continuance after explaining that respondent could not take the stand because he had a prior drug conviction and that he had made real efforts to obtain the presence of the co-defendants, albeit,

> ". . . not knowing at the present what they would testify to. They could come here and testify and make the District Attorney's case for him. I don't know, your Honor." (214).

Counsel also advised the Court that respondent's wife and brother-in-law had found Knowles and told him that it was important for him to appear, although they, too, did not know "what he was going to testify to" (216).

Counsel then submitted two applications for material witness orders after acknowledging that he had never spoken to either co-defendant and did not "have the foggiest idea whether their testimony will help or hurt the defendant" (217).* The Court signed the orders and granted a 24 hour continuance, but stated that after that the

* The affidavit in support of the applications alleged:

> "That both Powell and Knowles possess information material to the determination of such action, in that they were direct witnesses to the alleged crime, and are the only ones who can establish the guilt or innocence of Alonzo Singleton."

trial would have to proceed since the term was due to end that week (218).

At 10:00 a.m. on August 29, 1973, defense counsel advised the Court that Powell could not be located. However, Knowles had been found by respondent's wife and the police "at his home, same place where he was served with process, same place where the [respondent's] wife visited him yesterday" (221). Knowles had been arrested as a material witness but then released. The release was based upon the erroneous advice of an Assistant District Attorney of Kings County that the warrant was technically defective (221-222). The Court thereupon adjourned the case until 2:00 p.m. on the same day to give the defense an opportunity to locate Knowles. When the trial was reconvened that afternoon, the defense announced that it rested. The summations followed and the trial proceeded to its conclusion.

After trial, respondent's attorney made a motion to set aside the verdict and for a new trial on the ground that under the circumstances of the case it was an abuse of discretion and a violation of respondent's fundamental right to present witnesses in his defense to deny an application for a further adjournment of the case. In support of the motion, defense counsel contended that Knowles had stated at the time of his guilty plea that the drugs found in the car had been purchased by Powell, the driver. The motion was denied on October 16, 1973 and sentence was imposed.

In affirming respondent's conviction, a majority of the New York Court of Appeals concluded that respondent "should not be allowed to manipulate the Sixth Amendment to avoid due process of law" where, by absconding, he was "instrumental in bringing about the unavailability" of the witness at his trial and, in any event, based upon defense counsel's statements at trial, it was doubtful whether the witnesses' testimony would have been helpful to the defense. *People* v. *Singleton*, 41 NY 2d 402, 406 (1977).

C. The Opinion of the District Court

In his petition for a writ of habeas corpus respondent alleged that the refusal to grant a continuance violated his Sixth Amendment right to compulsory process. The District Court, after reviewing the record of respondent's conviction, held that there was no merit to this claim.

In rejecting respondent's contentions, the District Court emphasized that respondent had not demonstrated that the testimony of Powell or Knowles "would be favorable to his defense" (32a). The mere fact that Knowles had identified Powell as the purchaser

> "is not by itself enough to rebut the presumption of knowing possession established by the statute under which Singleton was charged and convicted. While it may be assumed that Knowles' testimony might have proven Singleton's lack of involvement in the purchase of the drug, [respondent] has made no claim that Knowles or Powell could have testified that Singleton had no knowledge of the presence of the drugs in the automobile." (32a)

The erroneous release of Knowles did not violate respondent's constitutional rights since the "Sixth Amendment does not obligate the government to locate defense witnesses after they have been served with subpoenas" (33a).

The District Court also rejected respondent's claim that the denial of an additional continuance deprived him of a fair trial. The Court pointed out that defense counsel had a month before trial "in which to locate and interview" the witnesses. Moreover, to the extent that respondent had absconded, "he was partly responsible for the difficulty in locating his witnesses" (33a). Finally, the Court held that in view of respondent's failure to show that the testimony of the witnesses would have been "favorable" to the defense, he had not made the "particularized showing

of prejudice" which was necessary to make out a violation of due process (34a).

D. The Opinions in the Second Circuit

On appeal, the Second Circuit reversed, one Judge dissenting. The majority held that "there was a sufficient showing that Knowles would have provided favorable evidence" on the basis of his statements at the time he pleaded guilty. In the majority's view, these statements indicated that "Knowles' testimony probably would have revealed his presence when Powell bought the drugs and [respondent's] lack of involvement in the transaction'"* (10a).

Citing cases in which a Sixth Amendment violation was found because the Government deported aliens before the

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* The following is the relevant portion of the minutes of Knowles' plea:

"The Court: What happened?
The Defendant: The police car flagged us down and asked for the registration of the car and Joe showed him the registration, you know; and he asked for the sticker of the car, and he couldn't find the sticker so he took out his flashlight and flashed it on the car and accidentally flashed it on the seat and he saw a brown envelope on the seat, and in it he checked the envelope out and it contained drugs.
The Court: When you say Joe, who are you referring to?
The Defendant: One of the defendants, Joe Powell.
The Court: Who else was in the car?
The Defendant: A boy named Singleton.
The Court: Alonzo Singleton?
The Defendant: Yes.
The Court: Whose narcotic drug was it?
The Defendant: It was Joe's.
The Court: How do you know?
The Defendant: Because he bought it.
The Court: How do you know he bought it; were you there?
The Defendant: Yes; I was there at the time.
The Court: So that you did know there was drugs in the car?
The Defendant: Yes."

defense could interview them, the majority noted that "where the Government has contributed to the unavailability of the witness, the showing of favorable testimony that is required of the defendant is relaxed" (10a-11a). Although the first allegation by petitioner that he could not interview Knowles was made in the Second Circuit, the majority analogized the instant case to the alien cases on the theory that Knowles' reluctance to come to court "suggest[ed] the futility of any attempt at an interview" (11a).

Notwithstanding the fact that defense counsel had acknowledged repeatedly that he did not know what Knowles would testify to, the majority concluded that the trial court erred in not continuing the trial until Knowles could be found. The majority reasoned that since the State's negligent release of Knowles necessitated such a continuance, "[i]t is inappropriate to put the burden on the defendant to obtain the continuance by additional proof that Knowles' testimony would have been favorable" (13a).

According to the majority, Knowles' release also had the effect of wiping the slate clean as regards any effect which petitioner's absconding may have had on his claim. Based upon its assumption that Knowles would actually have been called to testify, the majority determined that the "failure of Knowles to testify thereafter was attributable entirely to the negligence of the prosecutor for which [respondent] was certainly not accountable" (15a). In any event, even if respondent's own absence did contribute to Knowles' unavailability, he should not be sanctioned by being deprived of "testimony . . . vital to the defense" (16a).

The majority remanded the case to the District Court with directions to issue the writ unless respondent is retried within 60 days. Although there had been no allegations as to Knowles' present availability, the majority concluded that it was appropriate to order a new trial rather than to dismiss the indictment "because it is likely that Knowles can be found" (13a).

Circuit Judge Mansfield dissented on the ground that respondent had "failed to show that Knowles' testimony would have been relevant, material and favorable" to his defense (18a). Absent such a showing either (a) by alleging what Knowles would have said or (b) by showing a reasonable basis for believing that Knowles would testify favorably plus unsuccessful good faith efforts to interview Knowles, there was no violation of respondent's Sixth Amendment rights and no error in not granting a continuance so that Knowles might be found.

Judge Mansfield found that respondent had failed to satisfy the first alternative because he "has consistently failed to give the substance of what Knowles would testify to" (23a). In addition, Judge Mansfield rejected Knowles' allocution statements as a sufficient basis for finding that his testimony would have been favorable by demonstrating that they were just as consistent with respondent's guilt as with his innocence and, thus, improperly required "rank speculation of the flimsiest sort" by the Court as a substitute for a showing on the part of respondent (24a).

Nor did Judge Mansfield view this as a case where "the witness' unavailability or uncooperativeness may excuse a defendant's failure to make a specific offer of proof" (21a). Judge Mansfield pointed to the fact that even though Knowles' whereabouts were known during the relevant period, there was "no indication in the record that [respondent] or his counsel ever attempted to interview Knowles, much less that Knowles ever refused to talk with [respondent's] counsel" (23a).

Judge Mansfield also emphasized that where, as here, the respondent was seeking habeas corpus relief "years after his conviction," he should be required to submit an affidavit setting forth his post-conviction attempts to obtain a statement from his proposed witness and the substance of any statement so obtained (22a). In the instant case, respondent had four years after trial and before filing his federal

application in which to do this but, apparently, had undertaken no such effort.

In these circumstances, Judge Mansfield concluded that there was no basis for finding a Sixth Amendment violation.

REASON FOR GRANTING THE PETITION FOR CERTIORARI

The Court of Appeals' decision that the State violated respondent's Sixth Amendment rights was reached without the benefit of a hearing or allegations of fact peculiarly within respondent's knowledge and constitutes an unwarranted and improper exercise of judicial power by the federal courts over a question of state law.

It is fundamental that a state prisoner seeking to set aside a presumptively valid state judgment of conviction has the burden of alleging sufficient facts to make out his claim. *Procunier* v. *Atchley*, 400 U.S. 446, 451 (1971); *United States ex rel. Holes* v. *Mancusi*, 423 F. 2d 1137 (2d Cir. 1970); *United States ex rel. Cummings* v. *McMann*, 429 F. 2d 1295 (2d Cir. 1970); *United States ex rel. Rosen* v. *Follette*, 409 F. 2d 1042, 1044-45 (2d Cir. 1969). He must show not only that there was error in the state court proceedings, but that it was error of constitutional dimension *and* it deprived him of a fair trial. *Lisenba* v. *California*, 314 U.S. 219, 236 (1941).

Where, as here, he claims a violation of his Sixth Amendment right to compulsory process, his burden, like that of his federal counterpart, is to show that the witness' testimony would have been relevant, material and favorable to his defense. *Washington* v. *Texas*, 388 U.S. 14 (1967); *United States ex rel. Hunter* v. *Patterson*, 374 F. Supp. 608, 611 (S.D.N.Y. 1974); *United States* v. *Taylor*, 562 F. 2d

1345, 1362 (2d Cir. 1977); *United States* v. *Haldeman*, 559 F. 2d 31, 84 (D.C. Cir., 1976); *United States* v. *Wyler*, 482 F. 2d 170 (2d Cir. 1973); *Dearinger* v. *United States*, 468 F. 2d 1032, 1034-35 (9th Cir. 1972).

The decision of the majority below pays lip service to these rules. However, as a practical matter, the majority adopts the hindsight wisdom and unsubstantiated assumptions relied upon by respondent's attorney as a substitute for any allegations by the respondent himself. In so doing, the majority improperly substituted its judgment for that of the state courts on a question of state law, i.e., did the trial court properly exercise its discretion in refusing a further continuance to permit the defense to locate Knowles? See *Ungar* v. *Sarafite*, 376 U.S. 575, 589, 591 (1964). Cf. *Henderson* v. *Kibbe*, 431 U.S. 145 (1977). At the same time, the decision represents a substantial retreat from the rule that a state petitioner must show fundamental unfairness to prevail in a federal habeas corpus proceeding.

The Sixth Amendment right upon which respondent relies was described by this Court in *Washington* v. *Texas*, 388 U.S. 14 (1967), as follows:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms *the right to present a defense, the right to present the defendant's version of the facts* as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses *to establish a defense.*" 388 U.S. at 19 (emphasis supplied).

It is clear from the *Washington* decision that the right defined by the Court does not exist in the abstract. On the contrary, the right has meaning only if the defendant can show that the testimony of the witnesses he seeks "would

have been relevant and material to the defense." 388 U.S. at 23. Such a showing was made in *Washington* where the defendant denied that he had shot the victim and wished to call his co-defendant who, the

> "record indicates . . . would have testified that [defendant] pulled at him and tried to persuade him to leave, and that [defendant] ran before [he, the co-defendant] fired the fatal shot." 388 U.S. at 16.

The record in the instant case is in sharp contrast to that in *Washington*. Although respondent maintains that the testimony of Knowles was important because he was present at the time of the arrest, he has never alleged either in state court or in federal court what it is that Knowles could have testified to that was material to his defense, i.e., his "version of the facts," despite the fact that he had at least four opportunities to do so before the trial court, two opportunities to do so on direct appeal and the opportunity to do so both in his sworn petition in the District Court and in the Court below.* Instead, respondent's trial attorney, who, theoretically, was in the next best position after respondent to know, acknowledged repeatedly that he did not have "the foggiest idea whether [Knowles'] testimony will help or hurt the [respondent] (217).**

Respondent's reluctance to come forward, coupled with his trial attorney's apparent lack of knowledge and inertia,

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* Respondent's attorney made three requests at trial that the case be adjourned and also submitted a lengthy affidavit in support of a motion to set aside the verdict.

** Query whether this means that respondent never even gave his version of the facts to his attorney. If not, the State may hardly be held responsible. On the other hand, if the attorney knew respondent's version and it was favorable, he had an obligation to explain why he needed the witness—if not to the trial court, then at least in support of respondent's federal application. Thus his silence may mean that respondent's version was not helpful to the defense and that counsel was simply making a record for appeal in an otherwise cut and dried case. See *Wainwright* v. *Sykes*, 433 U.S. 72, 89 (1977).

should have led the court below to reject his claim. *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). Plainly, respondent had not made a "showing either at the time of [trial] or subsequently as to what favorable evidence the [absent witness] would have provided" (*United States* v. *Taylor*, 562 F. 2d 1345, 1362 (2d Cir. 1977)), let alone that the evidence would have been "significant". *United States* v. *Haldeman*, 559 F. 2d 31, 83 (D.C. Cir. 1976). On this record there was not even a basis for finding a violation of state law.

Nevertheless, the majority below concluded that Knowles was a "vital" witness and that the refusal to grant a further continuance was an error of constitutional magnitude. The majority accomplished this remarkable leap by means of Knowles' enigmatic statements at the time of his plea. However, as the dissent aptly demonstrates, Knowles' plea statements, which made no relevant reference to respondent, were just as consistent with respondent's guilt as with his innocence. Therefore, the majority could reach the conclusion it did only by indulging in the type of speculation which would not suffice were this a direct appeal and, *a fortiori* is uncalled for in a habeas corpus proceeding. In effect, the majority decided that its interpretation of the silences in the record was preferable to that of the state courts.

As a justification for "relaxing" the affirmative showing of favorable testimony which must be made, the majority relied upon the State's negligent release of Knowles following his arrest pursuant to the material witness order. In fact, there is no basis in the record for using the release of Knowles as a substitute for the necessary allegations which respondent, inexplicably, is so reluctant to make. On the contrary, Knowles' release is the proverbial red herring because it does not, as the majority mistakenly assumes, excuse the need to determine what would have been the nature of his testimony. If Knowles would *not* have

testified favorably to the defense, then relying upon his release to set aside a proper state court conviction effectively imposes a penalty upon the State for a constitutionally irrelevant act. That is not the function of the habeas corpus remedy.

Nor is this a case, like those cited by the majority, where a less specific offer of proof has been required because the government has deprived the defendant of an opportunity to interview the absent witness. See, e.g., *United States* v. *Ballesteros-Acuna*, 527 F. 2d 928, 930 (9th Cir. 1975). Instead, this aspect of the case illustrates the way in which respondent's claim was bootstrapped along because he was not required to come forward with the factual allegations peculiarly within his knowledge.

Up to and including the filing of his petition in the District Court, no suggestion was ever made on behalf of respondent that his trial attorney was unable to interview the co-defendants. In fact, respondent contended in the District Court that "Counsel had the right to call Knowles as a witness *and discover at trial* what this witness would say." (Respondent's Memorandum in the District Court, p. 14) (Emphasis Supplied). Apparently, it was his view at the time that counsel had no obligation to attempt to interview Knowles prior to trial.

However, undoubtedly prompted by the District Court's specific finding that counsel had a month before trial to interview witnesses, respondent argued for the first time in the Court below that defense counsel could not be more specific about what the witnesses would have said because he was unable to interview them. Respondent's Brief in the Second Circuit, p. 13. The majority below accepted this afterthought, not because it was supported by the record, but based upon its assumption that because Knowles was reluctant to come to court, it would have been difficult to

interview him.* Accordingly, the majority concluded that this was a proper case in which to relax the showing of favorable testimony by the respondent. The way in which the Court, together with respondent's attorney, filled the gap in respondent's claim could not be more apparent.

There was only one question before the Court in this case: Would the co-defendant Knowles have testified favorably to the defense? Respondent has always had the answer to this question. The refusal of the majority below to require him to provide that answer as a predicate to voiding his conviction makes a mockery of the principle of comity which has shaped the habeas corpus procedure.

Significantly, in its anxiety not to overburden respondent, the majority below imposed a serious practical burden upon the State by directing that respondent be released unless he is retried within a specific period. This relief is based upon the majority's assumption that Knowles is presently unavailable. In fact, neither petitioner nor respondent tendered any information as to Knowles' availability five years after respondent's trial. Therefore, rather than affording the State the opportunity to correct a defect in the proceedings leading to respondent's conviction, the decision below effectively requires the State to resurrect its case against respondent and prove it a second time before another jury. The decision thus has an impact upon the State which is entirely inconsistent with the spirit and purpose of the habeas corpus remedy and which reflects a misunderstanding of the role of the Federal Courts on collateral attack and the nature of respondent's burden in this proceeding.

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* It is evident from what counsel said to the Court, that Knowles' address was known, that respondent's wife found him and spoke to him at one point after the first continuance, and that by the following evening he was found by respondent's wife and a police officer and arrested as a material witness. As counsel stated to the Court in discussing the arrest, Knowles was found "at his home, same place where he was served with process, same place where the [respondent's] wife visited him yesterday" (221).

The requirement that an applicant for habeas corpus relief show fundamental unfairness is a rule intended to minimize friction within the federal system. In this respect it is like the exhaustion requirement (*Preiser* v. *Rodriquez*, 411 U.S. 475, 490-491 [1973]; *Wilson* v. *Fogg*, 571 F. 2d 91, 93 [2d Cir. 1978]) and the deference shown to state court findings of fact (*Townsend* v. *Sain*, 372 U.S. 293, 318 [1963]), to state procedural requirements (*Wainwright* v. *Sykes*, 433 U.S. 72 [1977]) and "necessarily due to a state trial judge in regard to the denial or granting of continuances" (*Ungar* v. *Sarafite*, 376 U.S. 575, 591 [1964]). Instead of using this rule to determine whether there was a miscarriage of justice in this case, the majority subverted it by adopting an approach which places a premium on the failure to come forward and invites collusion among co-defendants. If let stand, it will encourage other spurious attacks upon presumptively valid state court convictions and may, as in this case, compel the State to prove its case twice.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
December 27, 1978

Respectfully submitted,

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APPENDIX A

Opinion

Alonzo SINGLETON, Appellant,

v.

The Honorable LOUIS J. LEFKOWITZ,
New York State Attorney
General, Appellee.

No. 769, Docket 78-2008.

United States Court of Appeals,
Second Circuit.

Argued March 28, 1978.
Decided Sept. 12, 1978.

Petitioner appealed from an order of the United States District Court for the Southern District of New York, Charles E. Stewart, J., denying habeas corpus relief. The Court of Appeals, Oakes, Circuit Judge, held that the petitioner was deprived of his Sixth Amendment right to compulsory process when the state trial court refused to grant a short adjournment to secure the presence of an important defense witness who was unavailable due to the state's error.

Reversed and remanded.

Mansfield, Circuit Judge, filed a dissenting opinion.

Philip L. Weinstein, New York City (William Hellerstein, New York City, of counsel, for appellant.

Lillian Z. Cohen, Asst. Atty. Gen. (Samuel Hirshowitz, First Asst. Atty. Gen., Louis J. Lefkowitz, Atty. Gen., of the State of New York, New York City, of counsel), for appellee.

Before FEINBERG, MANSFIELD and OAKES, Circuit Judges.

OAKES, Circuit Judge:

This appeal is from an order of the United States District Court for the Southern District of New York, Charles E. Stewart, Jr., Judge, denying a petition for a writ of habeas corpus. Appellant was convicted of criminal possession of a dangerous drug in the fourth degree[1] after a jury trial before Justice Hyman Korn in the Supreme Court, New York County, Central Narcotics Part. He was given an indeterminate sentence with a three-year maximum. The conviction was affirmed by the Appellate Division, *People v. Singleton,* 50 A.D.2d 939, 377 N.Y.S.2d 197 (2d Dep't 1975) (memorandum opinion), and by the New York Court of Appeals, one judge dissenting. *People v. Singleton,* 41 N.Y.2d 402, 393 N.Y.S.2d 353, 361 N.E.2d 1003, (1977).

Appellant contends on appeal, as he has throughout the state and federal proceedings below,[2] that he was deprived of his Sixth Amendment right to compulsory process and his Fourteenth Amendment right to due process by the state trial court's refusal to grant him a short adjournment. The adjournment was necessary to secure the presence of a vital witness who was unavailable because the State had

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[1] N.Y.Penal Law § 220.15, repealed in 1973, read in pertinent part:

> A person is guilty of criminal possession of a dangerous drug in the fourth degree when he knowingly and unlawfully possesses a narcotic drug:
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> 1. With intent to sell the same; or
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> 2. Consisting of . . . (b) one or more preparations, compounds, mixtures or substances of an aggregate weight of (i) one-eighth ounce or more, containing any of the respective alkaloids or salts of heroin, morphine or cocaine. . . .
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> Criminal possession of a dangerous drug in the fourth degree is a class D felony.
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> 1969 N.Y.Laws, ch. 788, § 3.

[2] Singleton also unsuccessfully raised a Fourth Amendment claim in the state proceedings. It is not in issue on this appeal.

improperly released him from custody after his arrest pursuant to a material witness order. The district court rejected these constitutional claims and accordingly denied habeas corpus relief. *United States ex rel. Singleton v. Lefkowitz,* No. 77 Civ. 1264 (S.D.N.Y., dated Nov. 18, 1977). We reverse.

I. FACTS

Appellant was the front seat passenger and David Knowles was the back seat passenger of an automobile operated by Joseph Powell. When they were stopped by two New York City police officers for a license and registration check on September 24, 1971, the three occupants got out. While Officer Braga was checking the vehicle identification number on the hinge of the driver's front door, Officer Santiago observed Knowles, the back seat passenger, attempt to reach over Officer Braga's shoulder toward the interior of the car. At that point Officer Santiago grabbed Knowles away from the vehicle and aimed his flashlight inside the car. He observed an open manilla envelope on top of the console between the front seats. The envelope contained visible white powder, believed to be cocaine. The officer confiscated the envelope and arrested all three occupants. At subsequent search revealed a closed envelope containing white powder located between the driver's seat and the console. The envelopes actually held in aggregate three-eighths of an ounce of heroin. Appellant was released after arraignment but failed to appear as scheduled on October 1, 1971, when a bench warrant was issued by the criminal court.

On January 6, 1972, appellant, Powell, and Knowles were indicted by a Queens County grand jury for criminal possession of a dangerous drug in the fourth degree. Another bench warrant was issued by the Supreme Court, New York County, since appellant still had not appeared. On March 9, 1972, Powell was acquitted after a trial. On October 10, 1972, Knowles pleaded guilty to criminal possession of a

dangerous drug in the sixth degree, then a misdemeanor,[3] and on October 25 he was sentenced to time served.

Appellant appeared pursuant to his bench warrant on February 23, 1973. Prior to the introduction of evidence, his attorney, Mr. Fabricant, revealed to the court that Knowles had stated at the time of his guilty plea "that the drugs belonged to Joseph Powell and [Knowles] knew that because he saw Joseph Powell buy the drugs and there was no implication at all of Mr. Singleton." Defense counsel further indicated that he had subpoenaed both Powell and Knowles, and if Knowles could not be located counsel would move to introduce Knowles' plea statement as a declaration against penal interest.

Trial began on August 22, 1973, after a suppression hearing in early August. The prosecution rested on August 27, 1973, at which time Mr. Fabricant requested a continuance because neither codefendant had appeared in response to the subpoenas. An overnight continuance was granted, and that afternoon, according to Fabricant, Singleton's wife and brother went to see Knowles in Brooklyn. After they stressed the importance of his testimony, he promised to be present the following day at two o'clock in the afternoon.[4]

When Knowles still did not appear, counsel was granted a second overnight continuance. In addition, the trial judge, who obviously recognized the importance of

[3] N.Y.Penal Law § 220.05, prior to its repeal in 1973, provided:

> A person is guilty of criminal possession of a dangerous drug in the sixth degree when he knowingly and unlawfully possesses a dangerous drug.
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> Criminal possession of a dangerous drug in the sixth degree is a class A misdemeanor. 1969 N.Y.Laws, ch. 788, § 1.

[4] Counsel, Singleton's wife and brother had previously spoken to Powell's sister on many occasions, emphasizing the importance of her brother's coming to testify. Powell, however, was apparently never located.

Knowles' testimony,[5] granted a material witness order authorizing Knowles' arrest. The court warned the defense, however, that the trial would proceed the following day with or without the codefendants because the judge's term at the Special Narcotics Court was to end and he also had a doctor's appointment on Friday of that week. The order was signed on Tuesday, August 28, in the early afternoon and on the same evening Knowles was arrested at his home, the address listed in the arrest authorization, by a patrolman of the 79th Precinct in Brooklyn. A police officer who then telephoned an assistant district attorney of Kings County was told by him that the material witness order was defective. Thereupon Knowles was released from custody. When this was brought to Justice Korn's attention on Wednesday morning, August 29, the judge spoke to the Assistant District Attorney who admitted the error. The judge granted an adjournment until 2:00 p.m. to enable Fabricant and the district attorney to locate Knowles. When they returned to court unsuccessful, Justice Korn refused to grant a further adjournment. Defense counsel rested without producing any evidence, appellant was convicted, a motion to set aside the verdict was denied, and sentence was imposed.[6]

[5] Other than Singleton's presence as a passenger in the car where the heroin was found, there was no evidence linking him to the drugs. Consequently, the prosecutor was forced to rely solely on the presumption provided by N.Y.Penal Law § 220.25(1) (substantially unchanged under current law, *see* N.Y.Penal Law § 200.25(1) (McKinney Supp. 1977)), which stated in part:

> The presence of a dangerous drug in an automobile, other than a public omnibus, is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such drug was found. . . .

Appellant's defense therefore necessitated that he negate the presumption. However, his attorney counseled against his testimony because of a prior narcotics conviction.

[6] Appellant was released from prison on $2,500 bail on March 1, 1974, pending his appeals and continues to remain at liberty.

The New York Court of Appeals held that the trial court did not abuse its discretion or abridge appellant's right to compulsory process in refusing to grant appellant a fourth adjournment. *People v. Singleton, supra,* 41 N.Y. 2d at 405-06, 393 N.Y.S.2d at 356-57, 361 N.E.2d at 1005-06. The court first distinguished *People v. Foy,* 32 N.Y. 2d 473, 346 N.Y.S.2d 245, 299 N.E.2d 664 (1973), which held it reversible error to deny a short adjournment for the purpose of obtaining material alibi witnesses where they had been identified to the court, could be found within the jurisdiction and the movant had demonstrated diligence and good faith. The Court of Appeals believed that Justice Korn had been "most co-operative and accommodating," unlike the trial judge in *Foy* who "refused, for [his] own convenience, to grant even the briefest of adjournments." *People v. Singleton, supra,* 41 N.Y.2d at 406, 393 N.Y.S.2d at 356, 361 N.E.2d at 1003. "[I]t was hardly an abuse of discretion," concluded the Court of Appeals, "for the court to direct counsel to try the case and not the court's patience." *Id.* Moreover, said the Court of Appeals majority, unlike the case in *Foy,* Singleton, "by absconding from the jurisdiction of the court, brought about his difficulties in not being able to locate the witnesses at the time of the delayed trial." *Id.,* 393 N.Y.S.2d at 357, 361 N.E.2d at 1006. Finally, the Court of Appeals noted that there was doubt as to the "needfulness" of the testimony since the defendant's attorney had informed the court that he did not have the "foggiest idea" whether the testimony would help or hurt appellant.[7] It concluded that "under these circumstances, the defendant should not be allowed to manipulate the Sixth Amendment to avoid due process of law." *Id.*

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[7] It is true that at the time defense counsel sought continuances, he did not know what the codefendants would testify to for the obvious reason that they would not cooperate with him. However, he as well as the trial court were well aware of Knowles' plea statements. *See ante* at 4.

Dissenting, Judge Fuchsberg urged that the three criteria set forth in *Foy* as requiring an adjournment—that the witness be material, that the moving party not be guilty of neglect, and that the witness will appear at the deferred trial—were met here. *Id.* at 412-13, 393 N.Y.S. 2d at 360-61, 361 N.E.2d at 1009-10. He pointed out that "every reasonable expectation was that Knowles' testimony would assist the defense," *id.* at 412, 393 N.Y.S.2d at 360, 361 N.E.2d at 1010, as indicated by defense counsel's reference to Knowles' statement when he pleaded guilty. And he noted that the trial court had implicitly if not explicitly made a finding of materiality when it issued the material witness order. Judge Fuchsberg found "incomprehensible" how Singleton's absence months before had any bearing on the matter, because Knowles would have been available to testify but for his improper release from custody by the police. The dissent also reasoned that Knowles could and would have been produced had a reasonable adjournment been granted, for he was found by the police at his home even after he had twice ignored the subpoenas.

In agreeing with the New York Court of Appeals, the federal district court ruled that Singleton had not shown that the testimony of either coconspirator would be favorable to his defense.[8] This conclusion was partially based on defense counsel's lack of knowledge as to what the witness would testify to, *see* note 7 & accompanying text *supra.* Additionally, Judge Stewart held that Knowles' statement during his plea proceedings would not aid appellant because the fact that Powell purchased the drugs

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[8] We came to a similar conclusion in *United States v. Taylor,* 562 F.2d 1345, 1361-62 (2d Cir.), *cert. denied,* 434 U.S. 853, 98 S.Ct. 170, 54 L.Ed.2d 124 (1977). But in that case not only was there no showing of what the witness was expected to say in court, there was not even an indication of what he had said in the past. Here, by contrast, counsel apprised the court of Knowles' previous plea statement.

was not alone sufficient to rebut the presumption of knowing possession established by the statute. *See* note 5 *supra*.[9] The district court reasoned: "While it may be assumed that Knowles' testimony might have proven Singleton's lack of involvement in the purchase of the drugs, petitioner has made no claim that Knowles or Powell could have testified that Singleton had no knowledge of the presence of the drugs in the automobile."[10] *United States*

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[9] While the statute has been upheld in the New York state courts, *People v. Leyva*, 38 N.Y.2d 160, 379 N.Y.S.2d 30, 341 N.E. 2d 546 (1975), and by a federal district court, *Leyva v. Superintendent, Green Haven Correctional Facility*, 428 F.Supp. 1 (E.D.N.Y. 1977), *vacated and remanded*, 573 F.2d 1292 (2d Cir. 1978), a similar New York statute creating a presumption of possession of firearms was declared unconstitutional in *Allen v. County Court*, 568 F.2d 998 (2d Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3694 (U.S. May 9, 1978) (No. 77-1554). Since appellant has not raised the issue, we decline to address the presumption's constitutionality at this time.

[10] This reasoning misconceives the purpose and effect of the statutory presumption as construed by the New York Court of Appeals:

> [T]he presumption is evidentiary and rebuttable, whether by defendant's own testimony or by any other evidence in the case, including the inherent or developed incredibility of the prosecution's own witnesses. A jury is not to be told that it *must* find defendants guilty if the prosecution proves that they and drugs were present in a car together; it is only to be told that it *may* so find.
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> This affords added protection against the possibility that a presumption might operate to direct a verdict . . . .
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> . . . . .
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> The purpose of the presumption was to prove the fact of possession, inferential though such proof may be. As such, it formed part of the support for the prosecution's prima facie case. No less than with any other proof of facts offered by a prosecution, contrary evidence from a defendant does not negate the existence of a prima facie case; rather it presents an alternate set of facts, or inferences from facts, to the jury. The jury then has the right to choose between the two versions.

(footnote continued on following page)

ex rel. Singleton v. Lefkowitz, supra, No. 77 Civ. 1264, at 5. Finally, the district court held that since Singleton had deliberately absented himself from the court's jurisdiction at a time when the codefendants were "more easily located" appellant was "partly responsible for the difficulty in locating his witnesses." *Id.* at 6.

(footnote continued from preceding page)

> None of the defendants here disputed the fact that they were in the car, nor did they argue that drugs were not found in it. These were the two underlying facts which the statute requires be proved before the presumption applies. Once the prosecution had proved them, it was entitled to rely on the presumption as a part of its prima facie case. Defendant Low, by offering the jury additional facts not mentioned in the statute, in effect, asked the jury to draw a different inference [negating possession], one more favorable to him than the one the statute authorizes. So described, the fact inferred under the presumption can be seen to be like any fact which is sought to be proved by circumstantial evidence . . . .

People v. Leyva, supra, 38 N.Y.2d at 167-69. 379 N.Y.S.2d at 36-38, 341 N.E.2d at 550-52 (emphasis in original) (footnote omitted).

To be sure, Knowles did not explicitly state that appellant was unaware of the heroin. But it would not be unreasonable so to infer from his plea statement. And, of course, had appellant been permitted to locate Knowles, the testimony might have revealed Singleton's total lack of involvement with, knowledge of and control over the drugs. Even without clarifying testimony by Knowles, it would have been the jury's function to choose between the two sets of inferences. The jury could have rejected the presumption of knowing possession because it is

> "permissive in nature, permitting, but not requiring, the jury to find the defendant guilty. In effect, the presumption operates as an instruction to the jury that an inference of knowing possession may be drawn from the fact of unexplained presence in an automobile with illegal drugs. This permissible inference may be rebutted by any evidence in the case . . . ."

Leyva v. *Superintendent, Green Haven Correctional Facility, supra*, 428 F.Supp. at 5 (citation omitted). Had the jury discarded the presumption, the State, in all likelihood, would have been unable to prove possession (defined as exercise of dominion or control, N.Y.Penal Law § 10.00(8) (McKinney 1975)), and appellant, in all likelihood, would have been acquitted.

II. Discussion

[1-3] A defendant has a right "to have compulsory process for obtaining witnesses in his favor." U.S.Const. amend. VI. This right is violated when the State arbitrarily denies a defendant the opportunity to put on the stand a witness whose testimony would be relevant and material to his defense. *Washington v. Texas,* 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). The guarantee, of course, encompasses the right to compel the attendance of witnesses favorable to one's defense. *See, e. g., United States v. Taylor,* 562 F.2d 1345, 1361-62 (2d Cir.), *cert. denied,* 434 U.S. 853, 98 S.Ct. 170, 54 L.Ed.2d 124 (1977). The right is not without limitations. We have held that in the absence of some showing of what favorable evidence the witness would provide if compelled to testify, it is not improper to deny a continuance. *Id. See* note 8 *supra.* The question here, simply stated, is whether there was a sufficient showing that Knowles would have provided favorable evidence which was neither cumulative nor irrelevant. We believe that an affirmative answer is compelled. Based on his allocution statements, Knowles' testimony probably would have revealed his presence when Powell bought the drugs and Singleton's lack of involvement in the transaction. If believed by the jury, such evidence could have rebutted the presumption of knowing possession from Singleton's presence in the automobile. *See* note 10 *supra.* Obviously it would not have been conclusive; for the jury might have disbelieved Knowles or concluded that appellant was in knowing possession from his location in the front seat of the automobile near the envelopes. But in view of the presumption of innocence and the State's burden of proving Singleton guilty beyond a reasonable doubt, we cannot say that Knowles' anticipated testimony would not have tended to create doubt about appellant's knowing possession of the drugs.

[4] Moreover, it is important to note that where the Government has contributed to the unavailability of the

witness, the showing of favorable testimony that is required of the defendant is relaxed. *See United States v. Alonzo-Miranda,* 427 F.Supp. 924, 925-26 (E.D.Cal.1977), *citing United States v. Mendez-Rodriquez,* 450 F.2d 1 (9th Cir. 1971). In each of these cases, the Government deported the aliens on whose testimony the defendant relied. The courts held that the Government violated the defendant's Sixth Amendment right to compulsory process and Fifth Amendment right to a fair trial even though the defendant had made no showing that the witnesses' testimony would be favorable to the defense. The courts attributed the lack of evidence to the defendant's inability to interview the witnesses. In this case, the Government did not make Knowles unavailable in the same way, and the dissent relies in part on the defendant's failure to interview Knowles. But Knowles consistently refused to cooperate with the defense, forcing it to take continually more stringent action to secure his testimony. Knowles failed to appear in court to testify even when he was under a subpoena to do so, suggesting the futility of any attempt at an interview. In any event, but for the State's improper release of Knowles, Singleton would not have had to make any showing at all of the anticipated testimony. Prior to Knowles' plea, an interview would not have been possible; after the plea, the defendant relied on the plea statement as evidence of Knowles' testimony. The trial judge apparently found that Knowles' remarks at allocution were a sufficient indication that his testimony would be in Knowles' favor because he issued the subpoena and the material witness order even after defense counsel conceded that he was unsure just what Knowles' testimony would be. The plea statement was a sufficient basis for obtaining Knowles' arrest, and he would have been present to testify at Singleton's trial had the police not improperly released him. The State's error should not put a heavier burden on appellant.

By analogy to the deportation cases, arguably the State violated Singleton's right to compulsory process when the police released Knowles. This idea finds support in other cases where the State has allegedly interfered with defense witnesses. *See, e.g., Webb v. Texas,* 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972) (intimidation and threats by trial judge); *United States v. Bell,* 165 U.S.App.D.C. 146, 161, 506 F.2d 207, 222 (1974) (conditioning acceptance of codefendants' guilty pleas on their commitment not to testify on defendant's behalf); *United States v. Smith,* 156 U.S.App.D.C. 66, 478 F.2d 976 (1973) (advising witness that he might incriminate himself and be subject to prosecution if he testified); *Bray v. Peyton,* 429 F.2d 500 (4th Cir. 1970) (witness arrested on charge that had previously been dropped).

The State, of course, could have remedied the impairment of Singleton's defense by finding Knowles and presenting him at trial. Thus it is the State, not appellant, that should have borne the burden of searching for him after his improper release from custody. Although the Government generally has no obligation to look for a defendant's witnesses, this rule is conditioned on the "absence of a showing that such witnesses were made unavailable through the suggestion, procurement, or negligence" of the Government. *United States v. Ballesteros-Acuna,* 527 F.2d 928, 930 (9th Cir. 1975); *Ferrari v. United States,* 244 F.2d 132, 141 (9th Cir.), *cert. denied, Cherpakov v. United States,* 355 U.S. 873, 78 S.Ct. 125, 2 L.Ed.2d 78 (1957). *Cf. Motes* v. *United States,* 178 U.S. 458, 471-74, 20 S.Ct. 993, 44 L.Ed 1150 (1900) (error to admit written statement of witness who disappeared because of Government's negligence); *United States ex rel. Parson* v. *Anderson,* 354 F.Supp. 1060, 1073-74 (D.Del.1972), *aff'd,* 481 F.2d 94 (3d Cir.), *cert. denied,* 414 U.S 1072, 94 S.Ct. 586, 38 L.Ed.2d 479 (1973) (loss of evidence where the State is

"blameless").[11] "The state is . . . responsible for the absence of witnesses [if] it . . . wrongfully causes them to become unavailable. . . . [I]f the state is to blame for the absence of a witness, it must bear the consequences of the loss." Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 Harv.L. Rev. 567, 596 (1978) (footnotes omitted).

Here, the defendant does not rely on the State's improper release of Knowles as the sole basis for his claim that the State violated his Sixth Amendment right to compulsory process. He argues that the trial judge should have continued the trial until Knowles could be found. Granting the continuance was the least that the judge could have done to remedy the error resulting from the State's improper interference with the defendant's witness.[12] It is inappropriate to put the burden on the defendant to obtain the continuance by additional proof that Knowles' testimony would have been favorable. For surely here the trial judge abused his discretion by failing to grant what the Government, the New York Court of Appeals, and the dissent term a "fourth" continuance. The trial judge granted the first two continuances in response to increasingly diligent defense efforts to secure Knowles' presence at trial, and the total elapsed time was only a day and a half. These continuances were clearly proper, and the defense would have needed no further continuances if Knowles had re-

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[11] Even the dissenting opinion in *United States v. Mendez-Rodriguez,* 450 F.2d 1 (9th Cir. 1971), recognized that the court could say that the defendant had been denied due process if there were a "showing of negligence or misconduct on the part of the government." *Id.* at 6 (Kilkenny, J., dissenting).

[12] In the deportation cases, where the Government's action caused the witness to become permanently unavailable, the remedy is often to dismiss the indictment. *See United States v. Tsutagawa,* 500 F.2d 420 (9th Cir. 1974); *United States v. Alonzo-Miranda,* 427 F.Supp. 924 (E.D.Cal. 1977). Here the lesser sanction of a new trial is appropriate because it is likely that Knowles can be found.

mained in custody where he was following upon the second continuance. The judge quite properly declared the third continuance sua sponte in an attempt to remedy the blow to the defense caused by Knowles' release from custody. He erred, however, by granting the continuance only until the afternoon of that trial day instead of until such time as Knowles could be produced in court. The State's action necessitated a continuance, and Singleton is not properly charged with obtaining it. Thus it is inaccurate to speak of appellant's having obtained a third continuance and his seeking a fourth.

Alternatively, it may be argued that once the State improperly released Knowles, thereby negating the benefit to Singleton of the two previous continuances, this so-called fourth continuance was to be treated as though it were the first continuance he sought. So viewed, the case is quite similar to *Johnson v. Johnson,* 375 F.Supp. 872 (W.D.Mich. 1974), in which the court held that the denial of petitioners' motion for a day's continuance to enable them to secure the presence of crucial alibi witnesses violated their right of compulsory process. The witnesses there had been present in Grand Rapids, Michigan, on the first day of the trial but went home to Cleveland, Ohio, that night, apparently because of a misunderstanding about whether they had been released. The district court found that there was "no showing that the petitioners in any way contributed to the absence of their witnesses." *Id.* at 876. The court noted that because alibi was the only defense, the trial judge's denial of the motion for a day's continuance "effectively denied [the defendants] the right to present their defense." Relying on the short delay requested and the trial court's duty to "direct[ ] the prosecutor to look into [the] possible contempt of the court's process, with a view to redressing its disastrous effect by securing the witnesses' presence if at all possible," the court held that the defendants were deprived of a fair trial. *Id.* Singleton, too, had only one de-

fense; because of a prior conviction, he could not testify on his own behalf. His only defense was Knowles' testimony, the substance of which was intimated by Knowles' plea statement. The failure to continue the trial to enable Singleton to obtain Knowles' presence at trial deprived Singleton of a fair trial. It matters not that the trial judge's special narcotics term was about to end or that he had a doctor's appointment; fundamental rights do not depend on such vagaries.

It remains to be determined whether Singleton's Sixth Amendment argument is rendered inapplicable by his failure to appear for trial from October, 1971, until February, 1973. Why that failure of defendant should be regarded as affecting his right to compel Knowles' testimony is not immediately apparent. Knowles was taken into custody on the same day that the trial judge ordered Knowles' arrest as a material witness. At that point, appellant's prior failure to appear was rendered harmless, and the slate, in that respect, was wiped clean. The failure of Knowles to testify thereafter was attributable entirely to the negligence of the prosecutor, for which appellant was certainly not accountable.

However, even if this were not so, we agree with the dissenting opinion in the Court of Appeals. That is, assuming a causal relation between appellant's absence months before the State's disregard of the material witness order and Knowles' failure to testify, it would be an impermissible and devastating sanction to deprive Singleton of the right to secure the attendance of witnesses essential to his defense. *See People v. Singleton, supra,* 41 N.Y.2d at 412-13, 393 N.Y.S.2d at 361, 361 N.E.2d at 1010. As the Supreme Court emphasized in *Faretta v. California,* 422 U.S. 806, 818, 95 S.Ct. 2525, 2533, 45 L.Ed.2d 562 (1975), "the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it." And "[t]he rights to notice, confrontation, and compulsory process, . . . [are]

fundamental to the fair administration of American justice . . ." *Id.* We refuse to constrict the protection afforded a criminal defendant by the Sixth Amendment where the testimony is vital to the defense and but for the State's improper release of the potential witness there would have been no need for a further continuance. *Cf. Bray v. Peyton,* 429 F.2d 500 (4th Cir. 1970) (new trial ordered on habeas petition where conduct of government, even if not deliberate, obstructed defendant's offer of exculpatory proof).

[5] Although not urged by the State in any of the prior proceedings or on this appeal, an argument can be made that defense counsel waived appellant's right to compulsory process by failing to offer Knowles' plea statement[13] after the trial court refused to grant an additional continuance. It does not appear why counsel failed to proffer the declaration. We cannot imagine any trial strategy that conceivably would produce an intentional decision not to introduce the statement. Perhaps Mr. Fabricant thought, not without good reason, that New York's hearsay rules prohibit introduction of the declaration.[14] In any event, an

[13] It will be recalled that prior to the commencement of trial, Mr. Fabricant apprised the court of his intention to introduce the plea statement as a declaration against penal interest if Knowles could not be located. *See ante* at 4.

[14] We note that under New York law, the admissibility of Knowles' statement as a declaration against penal interest is far from clear. Perhaps counsel thought that the witness was not "unavailable" within the meaning of the hearsay exception. Since at least 1970, material hearsay statements against penal interest made by third persons have been admissible in New York, but only when the declarant is "dead, beyond the jurisdiction and thus not available; or where he is in court and refuses to testify as to the fact of the admission on the ground of self incrimination." *People v. Brown,* 26 N.Y.2d 88, 94, 308 N.Y.S.2d 825, 829, 257 N.E.2d 16, 19 (1970). None of these specific unavailability prerequisites exists in the instant case. Moreover, whether Knowles was "unavailable" in any sense of the word is questionable since in all probability Knowles could have been found without much difficulty

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inadvertent failure to offer alternative proof, the admissibility of which was doubtful, see note 14, *supra,* will not serve to preclude appellant from asserting his important Sixth Amendment right to compel the live testimony of Knowles. *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), *Francis v. Henderson,* 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976), and *Estelle v. Williams,* 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), do not control this case. We are not confronted with a situation where the defendant seeks to raise in a federal collateral attack an objection which was either not presented at the state trial or was presented in an inappropriate manner. Defense counsel repeatedly requested continuances, and also urged the constitutional infirmity underlying the trial court's failure to grant the continuance in a motion to set aside the verdict. The recent Supreme Court cases do

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or delay. *See ante* at 7; 5 *Wigmore on Evidence* § 1405, at 215-19 (Chadbourn ed. 1974).

Additionally, Knowles' statement may have actually favored his penal interest at the time it was made. While it did contain a fact against his interest—his admission that he know the drugs were present because he saw Joseph Powell buy them—*see* 5 *Wigmore on Evidence, supra,* § 1462, at 337, the statement was made in the course of implementing a plea bargain which would leave him guilty of only a misdemeanor. *See United States* v. *Seyfried,* 435 F.2d 696, 697-98 (7th Cir. 1970) (confession exonerating possible accomplices held not against declarant's penal interest because it "did not subject him to any additional charges or more severe punishment and in no way could be construed to adversely affect his penal interest"), *cert. denied,* 402 U.S. 912, 91 S.Ct. 1393, 28 L.Ed. 2d 654 (1971). His possible motive to misrepresent cannot be discounted in determining whether the allocution declaration was against his interest. *See Bunge Corp.* v. *Manufacturers Hanover Trust Co.,* 37 A.D.2d 409, 325 N.Y.S.2d 983 (1st Dep't 1971) (excluding statement prepared for litigation that was not clearly against declarant's interest where there was a motive to falsify), *aff'd on other grounds,* 31 N.Y.2d 223, 335 N.Y.S.2d 412, 286 N.E. 2d 903 (1972); 5 *Wigmore on Evidence, supra,* §§ 1463-64, at 337-39.

not extend so far as to preclude Singleton from raising judicial error of constitutional proportions simply because the defense did not offer other evidence that might have mitigated the harm engendered by not having Knowles' live testimony. *Cf. Suggs v. LaVallee,* 570 F.2d 1092, 1116-19 (2d Cir. 1978) (failure to assert at sentencing proceeding defendant's prior incompetency when he pleaded guilty does not constitute a waiver, for purposes of federal habeas corpus relief, of his attack on the constitutionality of the sentencing proceeding). Moreover, to preclude appellant from asserting his right to compulsory process seems most inappropriate where the State's own inadvertence caused Knowles' unavailability.

Judgment reversed; caused remanded with directions to issue writ of habeas corpus unless the State furnishes appellant a new trial within sixty days of the order of the district court.

MANSFIELD, Circuit Judge (dissenting):

I dissent because appellant has failed to show that Knowles' testimony would have been relevant, material, and favorable to appellant. There was, therefore, no denial of appellant's Sixth Amendment right to compulsory process, and no abuse of discretion on the part of the state court trial judge in not granting a fourth continuance for the purpose of locating Knowles and compelling his attendance as a witness.[1]

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[1] Although the majority opinion states that the trial judge "refused" to grant a fourth continuance, the record shows that defense counsel never asked for a continuance when he returned to court on the afternoon of August 29, but instead rested without objection. (Tr. 224). Nor did counsel offer the transcript of Knowles' allocution statement, which was available, and which counsel had earlier informed the court he would offer if Knowles did not appear. No suggestion was made by counsel at that time or at any other time during the trial that resumption of the pro-

(footnote continued on following page)

The Sixth Amendment entitles an accused "to have compulsory process for obtaining witnesses *in his favor.*" U.S.Const. Amend. VI (emphasis supplied). The Supreme Court described the right to compulsory process in *Washington v. Texas,* 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18

(footnote continued from preceding page)

ceedings without Knowles' testimony would violate the appellant's constitutional rights.

The importance of these facts is two-fold. First, it shows that this case is vastly different from *Washington v. Texas,* 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), which involved a defendant, charged with murder, who was not allowed to introduce exculpatory testimony of a co-defendant solely because of two seemingly irrational state statutes that disqualified an alleged or convicted accomplice from testifying for a defendant, although it permitted him to testify for the prosecution. The Supreme Court understandably characterized this as an arbitrary denial of the defendant's right of compulsory process. 388 U.S. at 23, 87 S.Ct. 1920.

In this case, the state trial judge issued the subpoenas for Powell and Knowles when they were requested. The judge later inquired, at the opening of the trial, whether service had been made and encouraged defense counsel to make every effort to locate the witnesses. (Tr. 20). When the witnesses failed to respond to the subpoenas, the judge continued the trial, and then issued the material witness orders the next day when they still had not appeared. When informed that the police had mistakenly released Knowles from custody, the judge personally telephoned the District Attorney's Office to determine what had occurred. He adjourned the trial for the third time, until the afternoon, and ordered the assistant district attorney to help the defendant and his counsel to locate Knowles again. (Tr. 222-23).

This solicitude for the defendant's right to produce witnesses in his favor cannot be equated properly with the arbitrary denial of that right in *Washington v. Texas, supra,* particularly since defense counsel did not make another request for a continuance, made no objection to the resumption of the trial, and did not suggest to the court that Knowles' absence would constitute a violation of appellant's constitutional rights.

Secondly, counsel's failure to follow through on his earlier expressed intention to offer the transcript of Knowles' allocution statement suggests that the testimony was not considered as vital by him then as it is thought to be now.

L.Ed.2d 1019 (1967), as the right to testimony that would be "relevant and material to the defense."

Therefore, in determining whether to delay a trial because of a witness' absence, the trial judge must consider not only the defendant's diligence in attempting to secure the presence of the missing witness, and the likelihood that the witness would be produced if a continuance were granted, but also, of equal importance, the question of whether the witness' testimony would be relevant, material, and favorable to the defense. The Constitution does not guarantee an accused the right to introduce irrelevant or immaterial evidence; nor does it entitle a defendant to compel the production of witnesses against him. See *United States v. Taylor,* 562 F.2d 1345, 1362 (2d Cir. 1977); *United States v. Haldeman,* 181 U.S.App. D.C. 254, 307, 559 F.2d 31, 84 (1976); *Dearinger v. United States,* 468 F.2d 1032, 1034-35 (9th Cir. 1972). See generally, Westen, Compulsory Process II, 74 Mich.L.Rev. 191 (1975).[2]

As Judge Oakes of this court stated in *United States v. Taylor, supra,* at 1362:

> "While ordinarily it would be of the greatest moment if a defendant were denied his right to compel the attendance of witnesses in his defense, see *Faretta v. California,* 422 U.S. 806, 818, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *Washington v. Texas,* 388 U.S. 14, 18-19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), particularly when the defendant seeks a witness in Government custody, here there was no showing either at the time of the request or subsequently as to what favorable evidence Garner would have provided if he had been called to testify and had waived his Fifth Amendment privilege. It is not improper to deny a request for a subpoena where the testimony of the witness would be only cumulative, *United States v. Rosa,* 493 F.2d 1191, 1194 (2d Cir.), *cert. denied,* 419 U.S. 850, 95 S.Ct. 89, 42 L.Ed.2d 80 (1974), where the defendant is vague as to the witness's potential evidence and is also aware that the witness might invoke the Fifth Amendment, *United States v. Wyler,* 487 F.2d 170, 173-74 (2d Cir. 1973), or where the witness would only give irrelevant testimony not necessary to an adequate defense, *United States v. Romano,* 482 F.2d 1183, 1195 (5th Cir. 1973), *cert. denied,* 414 U.S. 1129, 94 S.Ct. 866, 38 L.Ed.2d 753 (1974). See also *United States v. Sellers,* 520 F.2d 1281, 1285-86 (4th Cir. 1975), *vacated on other grounds,* 424 U.S. 961, 96 S.Ct. 1453, 47 L.Ed.2d 728 (1976). *Cf.* Fed.R.Evid. 403 (relevant evidence may be excluded because of 'considerations of undue delay, waste of time, or needless presentation of cumulative evidence'). Since there was never any showing of what Garner's testimony would be, it was proper to deny the continuance."

[2] In his comprehensive article on the right to compulsory process, Professor Westen states, "[a] defendant is not entitled to a continuance (nor, for that matter a subpoena) for absent witnesses unless he can offer proof that their testimony will be competent, relevant, material, and favorable to his defense." 74 Mich.L.Rev. at 241 (footnotes omitted).

The showing of relevance, materiality, and favorability that must be made will, of course, vary according to the circumstances confronted by a defendant seeking the evidence. If the witness has not been available for, or amenable to, an interview by the defendant or his counsel, then the witness' unavailability or uncooperativeness may excuse a defendant's failure to make a specific offer of proof concerning the witness' anticipated testimony. Even in such a case, however, a defendant must still be able to point to independent facts, as distinguished from speculation or conjecture, indicating that if subpoenaed the witness would be forced to give relevant and favorable testimony of material significance to the defense.

Such a showing should suffice to warrant a continuance. But if the defense, despite ample opportunity, has failed to

exercise due diligence in attempting to obtain from the witness a statement (oral or written) of the substance of his anticipated testimony, and, in addition, the court is asked to speculate as to whether the witness will possibly give relevant and material testimony favorable to the defendant, a continuance is not mandated by the Constitution. *United States v. Taylor, supra,* 562 F.2d at 1362; *United States v. Haldeman, supra,* 559 F.2d at 84; *Dearinger v. United States, supra,* 468 F.2d at 1034-35.

Moreover, when a defendant, years after his conviction, seeks habeas relief based on a trial judge's alleged abuse of discretion in not granting a continuance, the petitioner should at the very least be obligated to furnish an affidavit setting forth his efforts during the interim to obtain a statement from the missing witness and, if an oral or written statement was obtained, the substance of what the missing witness would have testified to if a continuance had been granted and he had been forced to testify. This should be a basic condition precedent to habeas relief when the allegation is a violation of the defendant's right of compulsory process.

Applying these principles here, on October 10, 1972, Knowles, whom appellant later proposed to call as a witness, pleaded guilty to criminal possession of a dangerous drug in the sixth degree, a Class A misdemeanor, N.Y.Penal Law § 220.05, and on October 25, 1972, was sentenced to time already served. On February 23, 1973, appellant, who had absconded after he had been indicted on January 6, 1972, was arrested pursuant to a bench warrant and was brought to trial on August 22, 1973. Thus appellant's trial took place approximately 10 months after Knowles had, upon his guilty plea, made the statement now pointed to by appellant as the basis for calling him as a witness.

During this 10-month period Knowles, having completed his sentence, was at large. Moreover, his whereabouts were apparently known to appellant and he was available

to appellant or his counsel during the 6-month period between appellant's arrest (Feb. 23) and his trial (Aug. 22). Indeed, appellant's wife and brother went to see Knowles at his home during the trial and received his assurance that he would appear and testify. The police had no difficulty locating him at his home on August 28 and taking him into custody.

We have no indication in the record that appellant or his counsel ever attempted to interview Knowles, much less that Knowles ever refused to talk with appellant's counsel, during this long period of apparent availability. Yet appellant, although his wife and brother "stressed the importance of his [Knowles'] testimony" when they visited him, has consistently failed to give the substance of what Knowles would testify to other than to point to a portion of his allocution statement of October 10, 1972, when he pleaded guilty. (According to appellant's trial counsel, neither appellant's wife nor his brother knew "what he [Knowles] was going to testify to." (Tr. 217).

I fail to find in Knowles' October 10, 1972, statement, the relevant portion of which is reproduced in the margin,[3] a

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[3] "The Court: What happened?
The Defendant: The police car flagged us down and asked for the registration of the car and Joe showed him the registration, you know; and he asked for the sticker of the car, and he couldn't find the sticker so he took out his flashlight and flashed it on the car and accidentally flashed it on the seat and he saw a brown envelope on the seat, and in it he checked the envelope out and it contained drugs.
The Court: When you say Joe, who are you referring to?
The Defendant: One of the defendants, Joe Powell.
The Court: Who else was in the car?
The Defendant: A boy named Singleton.
The Court: Alonzo Singleton?
The Defendant: Yes.
The Court: Whose narcotic drug was it?
The Defendant: It was Joe's.
The Court: How do you know?

(footnote continued on following page)

sufficient indication that he would have given relevant and material testimony that would have been genuinely favorable to appellant. Knowles merely stated, obviously in an effort to minimize his own participation in the alleged crime (he at first denied knowledge of the presence of drugs in the car), that the heroin (described by Knowles as cocaine) found in the envelopes on the front seat of the car next to a seat occupied by appellant, belonged to Powell and that Knowles was present when Powell had bought it.

Knowles did not say that appellant was not also present when the purchase had been made, or that appellant had not been informed about the heroin. Nor did Knowles indicate in any way that appellant was unaware of the presence of the heroin in the car or that he was not a co-owner or joint possessor with Knowles and Powell. Moreover, Knowles' identification of Powell as the purchaser did not lead Knowles himself to deny joint possession—indeed, he pleaded guilty to knowing possession.

Since Knowles' allocution statement is fully consistent with appellant's having likewise been present at the purchase of the heroin, and having shared in knowing possession of the drug, the suggestion that he would have given testimony exculpating appellant amounts to rank speculation of the flimsiest sort. We could just as well infer that he failed to appear at trial because he knew that his testimony would incriminate appellant by implicating him in the possession to which Knowles himself had pleaded guilty even though Powell, according to Knowles' statement, was the owner of the drug. The very fact that we must engage

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(footnote continued from preceding page)

The Defendant: Because he bought it.
The Court: How do you know he bought it; were you there?
The Defendant: Yes; I was there at the time.
The Court: So that you did know there was drugs in the car?
The Defendant: Yes."

in this speculation reveals that appellant has failed to make the requisite showing, particularly with respect to whether the evidence would be favorable to his defense.

Indeed, appellant's counsel repeatedly stated that he did not know what Knowles would testify, or whether his testimony would be favorable to appellant. He informed the state trial judge that he did not have "the foggiest idea whether . . . [Knowles'] testimony will help or hurt" appellant, and that the testimony of Knowles and Powell might in fact "make the District Attorney's case for him." (Tr. 217, 214). The Supreme Court's decision in *Washington v. Texas, supra,* 388 U.S. at 23, 87 S.Ct. 1920, heavily relied upon by the majority, is clearly distinguishable, since the record there showed the specific exculpatory testimony that would have been given by the witness had he been allowed to testify.

In addition to the 6-month period prior to trial during which Knowles or his counsel could have (but apparently did not) interview Knowles, appellant has had nearly four years from the date of his conviction (Aug. 30, 1973) to the filing of his federal habeas petition (Mar. 16, 1977) within which to take such action. However, no showing is made of any effort to obtain from Knowles a statement of the substance of what he would have testified to if a continuance had been granted and he had been brought to trial as a material witness.

Absent a statement of what Knowles would testify or a showing of unsuccessful good faith efforts to interview Knowles, coupled with a reasonable basis for belief that he would, if brought to trial by force, give testimony that was relevant, material, and favorable to appellant, the circumstances here do not provide any basis for a constitutional claim under the Sixth or Fourteenth Amendments.

APPENDIX B

Order.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of November, one thousand nine hundred and seventy-eight.

Docket No. 78-2008

ALONZO SINGLETON,

Petitioner-Appellant,

v.

THE HONORABLE LOUIS J. LEFKOWITZ, NEW YORK STATE ATTORNEY GENERAL,

Respondent-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is
Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
IRVING R. KAUFMAN,
Chief Judge

APPENDIX C

Order

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of November, one thousand nine hundred and seventy-eight.

Present:

HON. WILFRED FEINBERG,
HON. WALTER R. MANSFIELD,
HON. JAMES L. OAKES,

Circuit Judges.

Docket No. 78-2008

ALONZO SINGLETON,

Petitioner-Appellant,

v.

THE HONORABLE LOUIS J. LEFKOWITZ, NEW YORK STATE ATTORNEY GENERAL,

Respondent-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is
Ordered that said petition be and hereby is denied.

A. Daniel Fusaro
A. Daniel Fusaro
Clerk
by A. Heller
Deputy Clerk

APPENDIX D

Memorandum Decision

UNITED STATES DICTRICT COURT

Southern District of New York

77 Civ. 1264

United States of America, ex rel. Alonzo Singleton,

Petitioner,

—against—

The Honorable Louis J. Lefkowitz, New York State Attorney General,

Respondent.

Stewart, District Judge:

Petitioner, Alonzo Singleton seeks a writ of habeas corpus from this Court, under 28 U.S.C. & 2241 *et seq.*, claiming his Sixth and Fourteenth Amendment rights were denied him during his state trial for criminal possession of a dangerous drug.[1] Petitioner has exhausted his state remedies.

On September 24, 1971, New York City police arrested Alonzo Singleton, Joseph Powell and David Lester Knowles,

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[1] Petitioner was convicted of violating section 220.25 of the New York Penal Law. The relevant part of this section reads:

> § 220.25 Criminal possession of a controlled substance; presumption.
>
> 1. The presence of a controlled substance in an automobile, other than a public omnibus, is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such controlled substance was found; . . .

N.Y. Consol. Laws § 220.25 (McKinney 1975).

after discovering heroin in the car in which they were riding. Powell was acquitted of a charge of criminal possession of a dangerous drug on March 9, 1972. Knowles pled guilty to possession of a dangerous drug in the sixth degree on October 10, 1972. Petitioner Singleton, released after his arraignment, failed to appear in court on October 1, 1971 and did not appear on the bench warrant issued for him that day until February 23, 1973.

On July 17, 1973, petitioner was assigned the counsel who represented him at trial. Petitioner's trial began on August 22, 1973 and was adjourned to August 27, 1973. After the prosecution rested on that day, the defense counsel requested a continuance, explaining that Powell and Knowles, who had been served with subpoenas two days earlier, had not appeared. The trial judge granted the continuance until the following day.

When the court reconvened the morning of August 28, 1973, defense counsel requested another continuance because the subpoenaed witnesses could not be located. He also filed two applications for material witness orders.[2] The

[2] Sections 620.20 and 620.30 of the New York Criminal Procedure Law require that an applicant for a material witness order demonstrate reasonable cause to believe that the person he desires to call as a witness in a pending criminal action:

(a) Possesses information material to the determination of such action; and

(b) Will not be amenable or responsive to a subpoena at a time when his attendance will be sought.

N.Y. Consol. Laws § 620.20(1) (McKinney 1971). Powell and Knowles had already shown themselves to be unresponsive to subpoenas.

As to the first criterion, although counsel explained that he had never spoken with either witness and did not "have the foggiest idea whether their testimony [would] help or hurt the defendant," (T. 217), the affidavits supporting these material witness applications stated that Powell and Knowles "possess[ed] information material to the determination of such action, in that they were direct witnesses to the alleged crime, and are the only ones who [could] establish the guilt or innocence of Alonzo Singleton."

Court signed the orders and granted a twenty-four hour continuance.

The next day, August 29, 1973, counsel advised the trial judge that Powell could still not be located and that Knowles, although he had been picked up on the material witness order, was released by the police who were mistakenly informed by an Assistant District Attorney that the order was defective. The Court adjourned until 2:00 p.m.; that afternoon, the defense rested and summations were given.

The jury found Singleton guilty of criminal possession of a dangerous drug in the fourth degree. Petitioner moved to set aside the verdict and moved for a new trial on the grounds that it was an abuse of discretion and a denial of petitioner's right to present witnesses in his defense for the trial judge to have denied his application for further adjournment of the trial.[3] On October 16, 1973 these motions were denied and Singleton was sentenced to an indeterminate term of three years. Having served thirteen months of his sentence, petitioner was released on bail on March 1, 1974, pending his appeal in the New York courts. His release was continued by order of this Court on April 7, 1977 pending our determination of petitioner's application for a writ of habeas corpus.

The New York Court of Appeals found that petitioner's Sixth Amendment right to compulsory process had not been denied him at trial and the judge had not abused his discretion in violation of petitioner's due process rights by failing to grant another continuance on August 29, 1973. We agree with that Court's conclusions.

[3] The defense counsel did not specifically request another continuance when the trial resumed at 2:00 p.m. on August 29, 1973. However, the record reflects that counsel felt precluded from making such a request because of the trial judge's statement that prior day. The judge had said that despite the absence of Powell or Knowles on August 29, the trial would have to proceed because his term was due to end that Friday. (T. 218, 220.)

Under the Sixth Amendment a defendant has a right "to have compulsory process for obtaining witnesses in his favor" U.S. Const. amend. VI. This right[4] is denied a defendant when "the State arbitrarily denie[s] him the right to put on the stand a witness . . . whose testimony would have been relevant and material to [his] defense." *Washington* v. *Texas,* 388 U.S. 14, 23 (1967). The right to compulsory process is the right to compel the attendance of witnesses favorable to one's defense. *United States* v. *Taylor,* No. 76-1210 (2d Cir. April 13, 1977).

In the instant case however, petitioner has not shown that the testimony of either Powell or Knowles would be favorable to his defense. On the contrary, his counsel stated several times on the record that he did not know what these witnesses would say (T. 214, 216, 217), and even conceded that their testimony might "make the District Attorney's case for him" (T. 214).

Defense counsel states he told the trial judge that Knowles indicated in the allocution accompanying his plea that Powell bought the drugs. However, the fact that Powell may have bought the drugs is not by itself enough to rebut the presumption of knowing possession established by the statute under which Singleton was charged and convicted.[5] While it may be assumed that Knowles' testimony might have proven Singleton's lack of involvement in the purchase of the drugs, petitioner has made no claim that Knowles or Powell could have testified that Singleton had no knowledge of the presence of the drugs in the automobile.[6]

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[4] A defendant's Sixth Amendment right to compulsory process of witnesses favorable to the defense is incorporated in the Due Process Clause of the Fourteenth Amendment and thus is applicable to State Court proceedings. *Washington* v. *Texas,* 388 U.S. 14, 17-18 (1967).

[5] See footnote 1, *supra.*

[6] One envelope of drugs was apparently found on the console between the two front seats, another between the console and the

(footnote continued on following page)

Furthermore the erroneous release of Knowles, after he was picked up on the material witness order does not support petitioner's claim that his constitutional rights were denied him. The Sixth Amendment does not obligate the government to locate defense witnesses after they have been served with subpoenas. *United States* v. *DiGregorio,* 148 F.Supp. 527, 528 (S.D.N.Y. 1957); *cf. United States* v. *Edwards,* 366 F.2d 853, 870-871 (2d Cir. 1966), *cert. denied* 386 U.S. 919 (1967).

We find therefore that petitioner has not been denied his Sixth Amendment right to compulsory process of witnesses in his favor. *United States* v. *Taylor, supra,* No. 76-1210; *United States* v. *Wyler,* 487 F.2d 170 (2d Cir. 1973).

Petitioner also claims that the trial judge's denial of a fourth continuance to the defense on August 29, 1973 was an abuse of his discretion and a violation of petitioner's due process rights. Under the Fourteenth Amendment the granting of a continuance is within the discretion of the trial judge. *Ungar* v. *Sarafite,* 376 U.S. 575, 589 *reh. denied* 377 U.S. 925 (1965); *United States* v. *Rosenthal,* 470 F.2d 837, 844 (2d Cir. 1972), *cert. denied* 412 U.S. 909 (1973).

Admittedly the continuances granted petitioner so that he could locate his witnesses were relatively short. However, defense counsel had over a month between the time of his appointment and the start of the trial in which to locate and interview Powell and Knowles. Moreover, since Singleton had deliberately absented himself from the Court's jurisdiction from September 1971 until February 1973, he was partly responsible for the difficulty in locating his witnesses. Powell was tried and acquitted in

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(footnote continued from preceding page)

driver's seat. (Petitioner's Memorandum at 4.) Petitioner was riding in the front passenger seat. (Petitioner's Memorandum at 2.)

March, 1972, and Knowles pled guilty in October, 1972. Both were more easily located prior to the time of petitioner's delayed trial. Under the circumstances, we cannot say that the trial judge abused his discretion in denying petitioner a fourth continuance.

Furthermore, because petitioner has not shown that the witnesses' testimony would be favorable to him, he has not demonstrated that he was prejudiced by the denial of an additional continuance. In the absence of a particularized showing of prejudice, we cannot find that the denial of a continuance was an abuse of discretion and a violation of petitioner's due process right to a fair trial. *United States* v. *Rastelli,* No. 76-1350 (2d Cir. March 18, 1977); *United States* v. *Frattini,* 501 F.2d 1234, 1237-1238 (2d Cir. 1974); *United States ex rel. Hunter* v. *Patterson,* 374 F.Supp. 608, 610-611 (S.D.N.Y. 1974).

Accordingly, we find that the petitioner was not denied his Sixth or Fourteenth Amendment rights at trial.

His petition is denied.

So Ordered.

.....
United States District Judge

Dated: New York, New York
November 18, 1977.

APPENDIX E

Order.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

78 2008
Docket Number

Alonzo Singleton,

Petitioner-Appellant,

—against—

Hon. Louis J. Lefkowitz,

Respondent-Appellee.

It is hereby ordered that the motion to recall the mandate and stay its reissuance pending application to the Supreme Court to the United States for writ of certiorari pursuant to Rule 41 (b) be and it hereby is granted.

Wilfred Feinberg
Walter R. Mansfield

Nov. 28, 1978
Date

James L. Oakes
Circuit Judge